

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 56095-6-I
vs.)	
)	UNPUBLISHED OPINION
TED HARVEY HEFLEY,)	
)	
Petitioner.)	FILED: July 31, 2006
_____)	

PER CURIAM — Ted Hefley challenges his DUI conviction, alleging that numerous questions and answers offered by the State constituted an impermissible comment on his post-arrest silence. We agree, and because the errors were not harmless beyond a reasonable doubt, we reverse and remand for a new trial.

I.

One evening, Deputy Tim Sigel received a report of an erratic driver. Sigel located the car leaving a fast food parking lot, and followed the suspect vehicle for 30 blocks. He observed the car swerving and drifting within the lane, sometimes riding and bouncing out of the gutter. He pulled the car over and approached the driver, Ted Hefley. Hefley had bloodshot, watery eyes, a flushed face, slurred speech, and seemed sleepy. An open 12-pack of beer was

on the back seat, and several empty beer cans were on the floor behind the passenger's seat. Sigel asked for Hefley's license, which he located, but with some difficulty. Sigel asked Hefley to exit the car, and noticed Hefley stumble several times trying to make his way to the sidewalk. Sigel noticed a strong odor of intoxicants. After Hefley refused to take field sobriety tests, Sigel arrested him for driving under the influence.

Sigel verbally administered Miranda,¹ implied consent, and breathalyzer warnings from the standard form. He asked Hefley if he would be willing to submit to the breath test, to which Hefley responded, "I'd rather not." Then Sigel transported Hefley to the Kent jail. There, he reviewed the warnings from the form again, asked for Hefley's responses, and had Hefley sign the form. Again, Hefley refused to take a breath test. Sigel testified that in his opinion, Hefley was intoxicated. Hefley was charged with driving under the influence.

At trial, Hefley provided various excuses for the suspicious behaviors Sigel observed. The erratic driving was due to the fact that Hefley was trying to eat a hamburger, and he does not drive well at night due to a vision problem. Hefley attributed his watery eyes, disorientation, and stumbling to light sensitivity, which he attributed to a childhood eye surgery. He claimed that he did not agree to the field sobriety test because of this same disorientation. Hefley fumbled with his license, he maintained, because of a hand injury. He said the slurred speech resulted from a pulled tooth several days before, which

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 694 (1966).

caused him to bite his tongue. The opened and unopened beer cans were the remnants of a fishing trip the prior week, he stated. The smell of alcohol, said Hefley, resulted from his drinking “a little over two beers” five hours prior to the stop. Finally, Hefley claimed that he did not take the breathalyzer test because his asthma medications, which contained alcohol, might have tainted the results.

The State cross-examined Hefley extensively on these explanations. In the first exchange at issue, he questioned why his excuses had not been related to the arresting officer:²

[1] Atp³: Did you ever tell the officer that you were having a problem with the lights?

Hefley. No.

[2] Atp: Did you ever tell the officer that you had a problem with your hand and that was the reason you were fumbling with your license?

Hefley: He never told me he saw me fumbling with my license and it's just normal for me, so I had no reason . . .

[3] Atp: And you never told him, you never told him that.

After Hefley left the stand, the State recalled Deputy Sigel in rebuttal. The first five questions challenged Hefley's explanations:

[4] Atp: (unintelligible) Deputy Sigel. At any time did the defendant ever state that his eyes were a problem?

Sigel: No.

[5] Atp: At any time did the defendant state that he had any medical conditions that you needed to be aware of?

² The statements are numbered for ease of reference below.

³ “Atp” refers to the prosecuting attorney in the municipal court transcript.

Sigel: No.

[6] Atp: And when you asked the defendant about field sobriety tests, did he indicate that he was not performing those because of a problem?

Sigel: No.

[7] Atp: And when you talked to the defendant about his taking the breathalyzer [sic], did he inform you that he was taking inhalants?

Sigel: No he didn't mention anything about it.

[8] Atp: And he didn't tell you that that as [sic] the reason that he was refusing?

Sigel: He didn't give me a reason.

The jury convicted Hefley of driving under the influence.⁴ Hefley filed a RALJ appeal regarding the use of his silence to impeach his exculpatory story. The superior court affirmed the jury's finding, and held harmless any errors that occurred. Hefley appealed.

II.

The use of post-arrest, post-Miranda silence to impeach a defendant raises an issue of manifest constitutional error.⁵ The court reviews issues of manifest constitutional error de novo.⁶ A harmless error under the constitutional standard occurs if the reviewing court is convinced beyond a reasonable doubt

⁴ Unfortunately the record does not contain a transcript of closing arguments which would have showed how the State used the testimony.

⁵ State v. Holmes, 122 Wn. App. 438, 445-46, 93 P.3d 212 (2004).

⁶ State v. Elmore, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004), aff'd, 155 Wn.2d 758, 123 P.3d 72 (2005). Although Hefley did not object below, review is available when the defendant raises a manifest error affecting a constitutional right. RAP 2.5(a). That is the case here. See Holmes, 122 Wn. App. at 445-46.

that any reasonable jury would have reached the same result in the absence of the error.⁷ The reviewing court must look at the “untainted” evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt.⁸ A constitutional error is presumed prejudicial and the burden is on the State to prove that it is harmless.⁹

Comment on Silence

Use of the defendant’s post-arrest, post-Miranda silence to impeach an exculpatory story is a violation of Fourteenth Amendment due process protections.¹⁰ In Doyle v. Ohio,¹¹ two men were accused of selling marijuana in a narcotics sting. The defendants each testified that they had been framed by a street person, whom the agents had enlisted to conduct the deal.¹² Because none of the agents witnessed the transaction, there was little direct evidence with which to contradict the defendant’s explanation.¹³ The State attempted to undercut the “frame” story by questioning why it was not mentioned to the arresting officer, Kenneth Beamer, at the time of arrest:

Q. [By the prosecutor.] Mr. Beamer did arrive on the scene?

A. [By Wood.] Yes, he did.

Q. And I assume you told him all about what happened to you?

⁷ State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

⁸ Guloy, 104 Wn.2d at 426.

⁹ Guloy, 104 Wn.2d at 425 (citing State v. Stephens, 93 Wn.2d 186, 190-191, 607 P.2d 304 (1980)).

¹⁰ Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); U. S. Const. amend. XIV, § 1.

¹¹ 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

¹² Doyle, 426 U.S. at 612-613.

¹³ Doyle, 426 U.S. at 613.

A. No.

Q. You didn't tell Mr. Beamer?

A. No.

Q. You didn't tell Mr. Beamer this guy put \$1,300 in your car?

A. No, sir.

. . . .

Q. Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?

Q. But in any event you didn't bother to tell Mr. Beamer anything about this?

A. No, sir.^[14]

The Court held it fundamentally unfair, and a due process violation, to use post-arrest, post-Miranda silence to impeach a defendant's explanation offered at trial.¹⁵

Here, all but one of the challenged comments refer to both pre- and post-arrest silence. The State argues that the only post-arrest comments are 7 and 8, which refer to Hefley's refusal to take a breathalyzer. However, all of the comments except 6 implicate both pre- and post-arrest silence.¹⁶ Even though the State's questions refer to Hefley's behavior before arrest, the jury was

¹⁴ Doyle, 426 U.S. at 613-14.

¹⁵ Doyle, 426 U.S. at 618.

¹⁶ Question 6 does not implicate post-arrest silence because it is restricted to the time when Sigel asked the defendant about field sobriety tests, which only occurred pre-arrest.

invited to examine Hefley's silence on those matters during his entire interaction with Sigel. By framing the questions with "Did you ever," "At any time," and "Never," the State highlighted Hefley's silence during the entire interaction, from the time of the stop until arrest, transport to the Kent jail, and re-reading and signing of the consent form. It is impossible to segregate the pre-arrest from the post-arrest comments — Hefley's silence at all times was called into question. All of the questions and answers, except for number 6, were improper comments on Hefley's post-arrest silence.

Harmless Error

The State argues that any improper comment on post-arrest silence was harmless. Doyle did not address the issue of harmless error,¹⁷ but Washington cases have clarified that a constitutional harmless error analysis should be conducted.¹⁸

The prosecutor in State v. Carnahan¹⁹ had a strong case, but the court held that the error of commenting on post-arrest silence to impeach the defendant's exculpatory story was not harmless.²⁰ Carnahan was stopped while driving his van without a license, and one of the officers watched him hide something under the floor mat. A search under that same floor mat revealed a pipe with methamphetamine residue.²¹ At his trial for possession of a controlled

¹⁷ The issue was not raised. Doyle, 426 U.S. at 619-20.

¹⁸ Holmes, 122 Wn. App. at 446.

¹⁹ 130 Wn. App. 159, 122 P.3d 187 (2005).

²⁰ Carnahan, 130 Wn. App. at 169.

²¹ Carnahan, 130 Wn. App. at 162-63.

substance, Carnahan and his two defense witnesses, Trudy Rangel and William Bell, testified that Carnahan had loaned his van to someone named Jim Harmon just before the arrest. Carnahan denied knowing that the pipe was in the van.

The State recalled the arresting officer to rebut this defense:

Q. All right. Did Mr. Carnahan ever mention this Jim Harmon to you?

A. No.

Q. Okay. Did he ever mention Trudy Rangel to you?

A. No, he did not.

Q. How about Mr. Bell.

A. No.^[22]

On appeal, the court emphasized that this impermissible testimony came on rebuttal: “By reopening its case solely to elicit the improper testimony from Officer Sheridan, the State gave that testimony special importance.”²³ Despite the strong testimony of the arresting officer, the court concluded that the error was not harmless beyond a reasonable doubt.²⁴

Comments on silence are especially problematic where the outcome of the trial depends upon the jury’s determination of credibility, and the defendant’s story is not facially unbelievable.²⁵ The State attempts to distinguish such cases

²² Carnahan, 130 Wn. App. at 163.

²³ Carnahan, 130 Wn. App. at 169. In addition to the State’s rigorous cross-examination of Hefley, the same kind of rebuttal testimony was made by Deputy Sigel here.

²⁴ Carnahan, 130 Wn. App. at 169.

²⁵ Holmes, 122 Wn. App. 447.

by arguing that credibility is less important when the parties' two versions of events "are not mutually exclusive." While this argument is intriguing, the State cites no support for it, and it is irrelevant here. The State argued that Hefley was intoxicated, Hefley maintained that he was not. Those are mutually exclusive positions and the jurors based their decision entirely on whether they believed Sigel or Hefley.

The State also claims that an error is more harmful if "there was a significant dearth of untainted evidence as to the crucial contested point of the trial." There is a dearth here. The State's entire case consisted of Deputy Sigel's testimony. There were no field sobriety tests, no breathalyzer tests, no blood tests, no witnesses who testified that they watched Hefley drink just prior to driving, no admission of intoxication by Hefley. Almost every part of the State's case was called into question by Hefley's various explanations. Although Hefley's defense amounts to a highly improbable conflux of unfortunate coincidences, his story is not facially unbelievable. It is for the jury alone to weigh his credibility.

Finally, the State argues that the impact of the questions was negligible because they were small in quantity relative to the total number of questions asked at trial. This is not a factor considered in Carnahan or Holmes. Also, in each of those cases the number of impermissible questions and answers was fewer than the seven offered here.²⁶

²⁶ Carnahan, 130 Wn. App. at 163 (three); Holmes, 122 Wn. App. at 442 (one).

The State improperly commented on and emphasized Hefley's post-arrest

silence, and the error was not harmless beyond a reasonable doubt. The conviction is reversed and this case is remanded for a new trial.

REVERSED and REMANDED.

FOR THE COURT:

Grosse, J.

Baker, J.

Ajda, J.